

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1363

HENRY C. BRADSHAW,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
SUMMARY STATEMENT	3
REASONS FOR GRANTING WRIT	9
APPENDIX A—Opinion of the Court, "Government of the V. I. vs. Henry C. Bradshaw," CCA 3 No. 77-1914	A1
APPENDIX B—Opinion of the Court, "Carl Blount vs. Jugo- slavenska Linijska Plovidba," CCA 3 No. 75-2025	B1

TABLE OF CASES CITED.

	Page
Carl Blount v. Jugoslavenska Linijska Plovidba, — F. 2d — (CCA 3 No. 75-2025; D. C. Civ. No. 74-2147 E. D. of Pa.)	12
Frazier v. United States, 69 S. Ct. 201, 335 U. S. 497, 93 L. Ed. 187	13
Pointer v. United States, 151 U. S. 396, 408; 14 S. Ct. 410, 414	11
State v. Jackson, 43 N. J. 148, 203 A. 2d cert. den. 379 U. S. 982, 13 L. Ed. 2d, 85 S. Ct. 690	11
Swain v. State of Alabama, 85 S. Ct. 824, 380 U. S. 202, 13 L. Ed. 2d 759	13
U. S. v. Costello, 255 F. 2d 876, cert. den. 78 S. Ct. 1385, 357 U. S. 937, 2 L. Ed. 2d 1551	13

STATUTES AND RULES.

Federal Rules of Criminal Procedure:

Rule 24(b)	2, 7, 9
Rule 52(b)	11
28 U. S. C. 1254(1)	2
28 U. S. C. § 1870	12
14 V. I. C. § 923	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No.

HENRY C. BRADSHAW,

Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:**

Petitioner prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on January 24, 1978, affirming the judgment of the District Court of the Virgin Islands for first degree murder.

OPINIONS BELOW.

The opinion of the Third Circuit Court of Appeals was entered January 24, 1978. (Pet. App. A).

JURISDICTION.

The judgment of the court of appeals was entered on January 24, 1978. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

Whether one of the most substantial rights secured to the accused was violated when the Trial Court did not allow the accused the entitled number of peremptory challenges allowed by Rule 24(b) of the Federal Rules of Criminal Procedure.

In answering this question, we assign as error the action of the United States Court of Appeals for the Third Circuit in affirming the judgment of the District Court of the Virgin Islands when one of the most important rights secured to the accused was violated when the Trial Court limited the accused to only five peremptory challenges when the Federal Rules of Criminal Procedure 24(b) entitle the accused to 10 peremptory challenges.

SUMMARY STATEMENT.

The trial of "Government of the Virgin Islands vs. Henry C. Bradshaw" commenced on February 28, 1977. Bradshaw was charged with murder in the first degree which carries imprisonment for the remainder of his natural life without parole. (14 V. I. C. Sec. 923).

The Government was represented by three prosecutors: Julio *Brady*, Esq., United States Attorney, and two Assistant United States Attorneys, Mark *Milligan*, Esq. and R. Eric *Moore*, Esq. Defendant was represented by Attorney George *Miller*.

The following occurred *within Chambers of the Court*, out of hearing of the jury array:

"THE COURT: * * * (addressing Mr. Moore) Are you going to be sitting with them?

MR. MOORE: No, Your Honor, just through the selection of the Jury.

THE COURT: I will mention you, anyway, as you are giving assistance, all three of the U.S. Attorneys.

MR. MOORE: There is one other matter about peremptory challenges.

Are you included to grant us more than the normal amount?

THE COURT: No, I am not, not at all. The normal amount now is five.

MR. MILLIGAN: Yes, five.

MR. BRADY: Five on each side.

MR. MILLER: I thought we got 11, the Defendant having 10, and then, for the alternates an extra one.

THE COURT: That was under the old rules.

When did that statute go into effect?

MR. MILLIGAN: I think August of 1976.

THE COURT: It is different for capital cases, but this is not a capital case, although it is close to it.

MR. MOORE: It is ten for capital cases.

THE COURT: And five for felonies. One of the reasons that I am not enlarging the peremptories is I don't know if I can. In multiple defendants we can, but I don't think I can.

You cited that case where a Judge gave unlimited peremptories, but I don't believe he had the authority. I don't think under the Rules, the way they are written, it says there shall be five for each side, but even if I had discretion I wouldn't like to do it because I think a lot would be eliminated for cause, and that will be our biggest problem, that is to get enough jurors selected to make up a jury because there will be five peremptories.

MR. MILLER: *I would like to double check that. You sound like you are not absolutely sure about the rule.*

THE COURT: *I do not know when that went into effect but I remember checking it. I do think they are in effect since August.*

• • • (Trial Transcript p. 4-6)

• • •

(Whereupon voir dire examination was conducted of the jury panel by the Court, after which the following occurred at sidebar, out of the hearing of the Jury)

THE COURT: Are there any challenges for cause?

MR. MILLER: Mr. Messer, I sued him, although he may not recall me.

THE COURT: All right.

MR. MILLER: Also, for cause, No. 46, Mr. Charles.

Mr. Charles mentioned that his son was shot and also that he was a juror in the Santana case where the two defendants were convicted.

THE COURT: I would be inclined to dismiss him.

MR. MOORE: He didn't mention one factor, that I prosecuted his son and he is now doing seven years in the federal penitentiary.

THE COURT: Let's excuse him.

MR. MILLER: Also, No. 12, Mr. Hetnar, he also was a juror in a 2nd degree murder case and the defendant was convicted.

THE COURT: That would be more properly a peremptory challenge. He did say he would be fair and impartial. He was fair and impartial in that trial, too. I asked that question for peremptory purposes.

MR. MILLER: Okay. Also, No. 43, Agnes Davis, whose nephew was shot.

THE COURT: And killed.

MR. MILLER: Yes.

THE COURT: I would say that even though she said she could be fair and impartial, I would take her off.

MR. MILLER: Also, No. 22, she said her brother was shot, also, I believe.

MR. MILLIGAN: No, her brother was a Defendant.

MR. MILLER: Perhaps you guys want her off.

THE COURT: I don't think we will take her off.

MR. MILLER: Then, there are a number of people who are related to policemen or whose sons or brothers are policemen, I would ask that they be excluded also, for cause.

THE COURT: Again, there are so many of those in every trial that I normally do not exclude them. I did ask if they could weigh the credibility of the testimony of police officers as well as they could others.

I would have to deny that request.

MR. MILLER: That is the only challenges I have.

THE COURT: Do you have any challenges?

MR. MILLIGAN: No, Your Honor, not for the Government.

THE COURT: Are we going to have three alternates?

COURT CLERK: That is what you mentioned before.

THE COURT: Do you think we need them?

MR. BRADY: I think so, yes, sir.

THE COURT: That means you get two, there is one challenge for these two and one challenge for this one, two challenges, so you get your five plus two, and the Government has the same.

All right, gentlemen.

(Whereupon the following occurred within the hearing of the Jury panel)

THE COURT: Would you care if we had a recess right now, or do you want the prospective jurors in their seats?

MR. MILLER: I have no objection to a recess, Your Honor.

THE COURT: They have been in here for a couple of hours.

Let's have a recess while the attorneys exercise their peremptory challenges.

We will have a 15 minute recess, so at a quarter after eleven, if everyone will come back, I would like you to sit in the same seat you are occupying now, we will then announce the lucky ones selected for the jury.

(Whereupon the trial was in recess from 10:59 a.m. until 11:28 a.m. of the same day, with the same parties present, at which time the following occurred within the hearing of the jury panel." * * *)

(Trial Transcript p. 9-13).

Bradshaw was convicted for first degree murder and imprisoned for the remainder of his natural life without parole.

Bradshaw appealed to the Third Circuit Court of Appeals contending that the judge committed reversible error in granting *only five (5) peremptory challenges to the accused*, in violation of Rule 24(b) of the Federal Rules of Criminal Procedure. The *trial judge also granted the Government five (5) peremptory challenges*.

The Third Circuit Court of Appeals found no reversible error, affirming the judgment of the District Court, stating:

"Once told by defense counsel that *he would 'double check'* the law on peremptory challenges, the Court

was justified in assuming that counsel would do so and bring any error of law to the Court's attention. * * * Under the circumstances, we hold that counsel waived objection to the denial of the five additional peremptory strikes."

The trial transcript (as shown above) shows that the following occurred in *Chambers*:

"**MR. MILLER:** I would like to double check that. You sound like you are not absolutely sure about the rule.

THE COURT: I do not know when that went into effect but I remember checking it.

I do think they are in effect since August."

(Trial Transcript p. 6)

The record does not show any knowing waiver of the accused's substantial right. The Trial Court put the matter to rest when it stated that "I remember checking it." The Court committed plain and reversible error with the assistance of three prosecuting attorneys.

REASONS FOR GRANTING THE PETITION.

This case presents a question involving Rule 24(b) of the Federal Rules of Criminal Procedure as enacted by Congress. Here the accused was deprived of his absolute statutory right to ten peremptory challenges; the trial court limited the accused to only five (5) peremptory challenges and granted the Government the same number (5) in violation of Rule 24(b). Defendant exhausted his five peremptory challenges. The trial court's action violated one of the most important rights secured by an Act of Congress to the accused for the impaneling of a jury. Such restriction by the trial court is plain and reversible error.

The trial commenced on February 28, 1977. The law in effect on that date, as now, entitled Bradshaw to ten peremptory challenges.

Rule 24(b) of the Federal Rules of Criminal Procedure provides:

"(b) Peremptory challenges * * * If the offense charged is punishable by imprisonment for more than one year, the government is entitled to six peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. * * *"

The Court of Appeals stated in its opinion (App. "A"):

"The government now concedes that the trial judge made an error in allocating peremptory strikes to the parties."

* * *

"The United States Attorneys present affirmed that the law permitted five."

* * *

"Bradshaw's jury was selected on February 28, 1977. The law effective on that date, as now, entitled him to ten peremptory challenges."

The Court of Appeals concluded that Mr. Miller, defense counsel, waived objection to the Court's restriction of the peremptory challenges to five instead of ten. The Court of Appeals finds defendant's waiver in defense counsel's statement: "*I would like to double check that.* You sound like you are not absolutely sure about the rule." The Court stated:

"Once told by defense that *he would* 'double check' the law on peremptory challenges, the Court was justified in assuming that counsel would do so and bring any error of law to the Court's attention." (App. "A")

If the Court of Appeals would have considered the Court's reply to defense counsel's statement "I would like to double check," the Court of Appeals could have concluded that the trial court put the matter to rest. The record shows:

MR. MILLER: *I would like to double check that.* You sound like you are not absolutely sure about the rule.

THE COURT: I do not know when that went into effect but *I remember checking it.* I do think they are in effect since August." (App. "A") (Emphasis added)

If the trial judge was not certain, wouldn't he have stated that the matter should be researched? The trial judge and three United States Attorneys affirmed that the law permitted five peremptories. Defense counsel relied on the trial court's and on the three United States Attorneys' affirmations of the law.

The Court of Appeals in its opinion stated that "*he* (defense counsel) *would* 'double check' the law on peremptory challenges * * *." Defense counsel stated that

he "would like to double check that." How can this be construed as an intelligent-knowledgeable waiver of a substantial right. Defense counsel stated that he would like to double check but he was never given the opportunity to do so. The record is clear that the trial judge, after stating that he checked on the law, continued with the trial matters.

The Court of Appeals never considered whether Bradshaw's substantial rights were violated, resulting in plain error. In appellant's brief, the attention of the Court of Appeals was called to Justice Harlan in *Pointer v. United States*, 151 U. S. 396, 408; 14 S. Ct. 410, 414, wherein Justice Harlan stated:

"The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused. * * * He may, if he chooses, peremptorily challenge 'on his own dislike without showing any cause.' He may exercise that right without reason * * *, arbitrarily and capriciously. * * * Any system for the impaneling of a jury that * * * embarrasses the full, unrestricted exercise by the accused of that right must be condemned."

The right to make peremptory challenges in a criminal case is a valuable and substantial right. *State v. Jackson*, 43 N. J. 148, 203 A. 2d, cert. den. 379 U. S. 982, 13 L. Ed. 2d 572, 85 S. Ct. 690.

Under Rule 52(b) of the Federal Rules of Criminal Procedure, the Court of Appeals could have noticed the trial court's error even if not brought to the attention of the Court. The trial court's curtailment of the number of peremptory challenges is a defect affecting substantial rights. Rule 52 provides:

• • •

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In *Carl Blount v. Jugoslavenska Linijska Plovida*,^{*} — F. 2d — (C. C. A. 3rd No. 75-2025) (D. C. Civil No. 74-2147 E. D. of Pa.), this same Court of Appeals considered the question of whether it was reversible error to grant each party a fourth peremptory challenge in violation of Title 28 U. S. C. Sec. 1870. In this civil case, plaintiff's counsel said, "I don't want any additional strikes." The Court of Appeals considered this an objection by plaintiff's counsel, stating, "... we conclude that cognizance should be taken of the objection because of the fundamental issue which it raises." Here, the Court held:

"The statute, in our view, provides that in single party civil litigations the court is not authorized to allow more than three peremptory challenges per side."

If a trial court is not authorized to allow more peremptory challenges, can a trial court decrease the number of peremptory challenges as authorized by the law?

In this criminal case, defense counsel asked for more peremptory challenges; request was denied; the trial court decreased the number of peremptories; defense counsel would like to have double checked but the Court reassured defense counsel that it checked on the law—so the Court of Appeals found a waiver or objection.

In the civil case (Blount), plaintiff's attorney objected to an additional peremptory given by the court; the court considered the question of peremptory challenges because "of the fundamental issue it raises," and reversed the trial court.

* Opinion of Court is attached as App. "B".

The issue of the selection of the jury is involved in both cases with different results.

The right of peremptory challenge is given in aid of the party's interest in having a fair and impartial jury. *Swain v. State of Alabama*, 85 S. Ct. 824, 380 U. S. 202, 13 L. Ed. 2d 759; *Frazier v. United States*, 69 S. Ct. 201, 335 U. S. 497, 93 L. Ed. 187.

Here the record shows that defendant exhausted the five peremptory challenges allowed by the trial court. The record shows that defense counsel, Mr. Miller, challenged certain jurors for cause, but the trial court stated that peremptory challenges would be proper for striking them. (Trial Tr. p. 10-12).

Here, one of the most important rights secured to the accused was violated by the trial court's restriction of the number of peremptory challenges. Peremptory challenges are exercised by a party not in the selection but in the rejection of jurors. *U. S. v. Costello*, 255 F. 2d 876, cert. den. 78 S. Ct. 1385, 357 U. S. 937, 2 L. Ed. 2d 1551.

The Court of Appeals' conclusion in finding no reversible error warrants further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

DATED this 22 day of February, 1978.

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APPENDIX A.**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 77-1914

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed, postage fully prepaid, to the Solicitor General of the United States, Washington, D. C., this 22 day of February, 1978.

EDWARD J. OCEAN

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee,
v.

HENRY C. BRADSHAW,

*Appellant.***APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF THE VIRGIN ISLANDS; DIVISION OF ST. CROIX**

Argued December 5, 1977
Before ADAMS, ROSENN and HUNTER, *Circuit Judges*

Julio A. Brady
Mark L. Milligan
Attorneys for Appellee
Edward J. Ocean
Attorney for Appellant

(Filed January 24, 1978)

HUNTER, *Circuit Judge:*

Henry C. Bradshaw appeals his judgment of conviction for first degree murder. After his trial by jury in the

(A1)

District of the Virgin Islands, he was sentenced to life imprisonment. The appeal challenges the sufficiency of the evidence supporting the verdict and raises the question of whether a new trial should be granted because the trial judge, now, on appeal, concededly in error, allowed defendant to exercise only five peremptory challenges instead of ten.¹ For the reasons discussed below, we affirm.

I

Defendant was charged with first degree murder, 14 V. I. C. § 922(a)(1), by an information filed November 12, 1976. Trial commenced February 28, 1977. At the start of jury selection the trial judge indicated that the law allowed defense only five peremptory challenges. Defense counsel used all five strikes.

The jury returned a guilty verdict on March 3, 1977. The hearing on sentencing was held on March 30. Bradshaw was given the mandatory sentence for first degree murder, life imprisonment without parole or probation. 14 V. I. C. § 923(a).

The facts as developed at trial were as follows. On March 7, 1976, Marilyn Pickering, a St. Thomas resident, registered at a hotel in Christiansted, St. Croix. The following morning she was found shot to death. An expert testified at trial that she had been dead for at least twelve hours before her body was found. The victim had been shot twice with a .38 caliber weapon. An autopsy showed a .22 percent level of alcohol in her blood at the time of her death and the presence of epoxy in her digestive tract.

1. In oral argument counsel also raised a third point intimated in his brief, whether the instructions to the jury on the requirement of a finding of a "willful, deliberate, and premeditated" killing were adequate. Trial counsel made no objection to this instruction, and we find no plain error. See F. R. Crim. P. 30; Government of the Virgin Islands v. Navarro, 513 F. 2d 11, 16 (3d Cir.), cert. denied, 422 U. S. 1045 (1975).

No gun was found, but a test done by investigators showed that decedent had not fired any weapons.

According to his testimony, Bradshaw became acquainted with decedent a month before the killing, when she hired him as a private detective. Subsequently, the two developed a close personal relationship. He testified that decedent had asked him to accompany her to St. Croix on the day of the shooting. Bradshaw arrived by seaplane on the island from St. Thomas the same morning as decedent thought on a different flight. He had traveled under an assumed name.

Two hotel employees testified that they saw defendant that afternoon at the hotel. One saw him walking towards decedent's room at about 1:00 p.m. Bradshaw's fingerprint was found on a drinking glass in the room.

Although Bradshaw and one witness testified that he returned to the seaplane terminal at 3:45 p.m., two witnesses placed him there between 4:30 and 5:00 p.m. Employees at the hotel testified that they had heard a gunshot or explosion coming from the vicinity of decedent's room between 4:00 and 4:30 p.m.

After returning to St. Thomas by seaplane under another false name, Bradshaw flew under his own name to Puerto Rico for an overnight stay.

When contacted by investigators, Bradshaw acknowledged that he owned a licensed .38 caliber Smith and Wesson revolver. He informed them, however, that the gun had that day been stolen from his car trunk. The investigators testified that they inspected the car and found no signs of tampering or break-in.

Questioned about his activities on November 7, Bradshaw told police that he had spent the day fixing his car on St. Thomas and then flew to Puerto Rico for an overnight visit. Bradshaw was later arrested.

II

At the close of the government's case against him, defendant made a motion for acquittal based on the insufficiency of the evidence. The motion was denied.

The government's brief in this appeal claims that the motion was not renewed before the jury retired nor made within seven days of the jury's verdict under F. R. Crim. P. 29(c). Defendant's appellate counsel does not dispute this observation in his brief nor did he at oral argument. Nonetheless, in our review of the record, we have found a paper entitled "Motion for Judgment of Acquittal" dated March 7, 1977 and stamped as filed on March 10. The paper has been placed out of its chronological sequence in the record. The record indicates that the motion was heard and denied on March 30, 1977. Since the March 10 motion was filed within seven days of the March 3 jury verdict, it was timely under Rule 29(c). Contrary to the assumptions of both counsel on appeal, we find that the motion for acquittal has been properly preserved for appellate review.

The standard to be used in judging the sufficiency of the evidence after a properly preserved motion for acquittal has been made is whether, viewing all the evidence adduced at trial in the light most favorable to the government, there is substantial evidence from which the jury could find guilt beyond a reasonable doubt. *Government of the Virgin Islands v. Peterson*, 507 F. 2d 808, 900 (3d Cir. 1975); *Government of the Virgin Islands v. Lanclos*, 477 F. 2d 603, 606 n. 3 (3d Cir. 1973). The standard does not differ when the government's case is based on circumstantial rather than direct evidence. *United States v. Boyle*, 402 F. 2d 757 (3d Cir. 1968).

Although there were no witnesses to the killing of Marilyn Pickering, there is sufficient evidence in the record to support the jury's verdict that Bradshaw is guilty

of first degree murder. Defendant by his own admission was on the Island with decedent. He was seen near her hotel room close to the time of the shooting, and his fingerprint was found in the room. He admittedly owned a gun of the type and caliber which fired the fatal bullets. Further, Bradshaw was seen at the seaplane terminal the morning of November 7 with a briefcase and in the hotel with a briefcase and a large envelope. Bradshaw testified that he usually carried his gun in his briefcase. The jury could have concluded from this evidence that Bradshaw had the opportunity to commit the crime.

Bradshaw traveled both ways between St. Thomas and St. Croix under an assumed name. While Bradshaw flew from St. Thomas to St. Croix, back to St. Thomas, and then to Puerto Rico on November 7, he had earlier told his former wife that he would spend the day in Puerto Rico. This evidence would support a conclusion that Bradshaw had attempted to conceal his trip to St. Croix as a part of planning the murder.

Bradshaw was also connected to the killing by evidence that he attempted to conceal the crime. Defendant told his former wife, his employer and police that he had traveled only to Puerto Rico on November 7. When returning to the St. Croix airboat station the afternoon of the 7th, he told an employee there that he had come from Fredericksted. He testified that his gun, the same type and caliber which had been used in the killing, had been stolen from him the same day that police came to question him. While he claimed that the trunk of his car was broken into while the car was parked in his employer's lot, police at the scene found no evidence of a break-in. The jury, from all of this material, is supported in its finding that Bradshaw was the killer.

The circumstances of the murder could well have led the jury to conclude that the killing was a willful, de-

liberate, and premeditated act. The victim was quite drunk at the time of her killing. Her stomach was found to contain some epoxy, a substance which an expert at trial testified would not likely have been accidentally ingested. Some rat poison was also found in her room. From this the jury could have concluded that the defendant's resistance was low and that an attempt had been made to poison her before she was shot. Combining this evidence with the supportable conclusion that Bradshaw before the shooting had attempted to conceal his trip to St. Croix and that he had carried his gun with him on the trip although not doing work at the time as a private detective, the first degree murder verdict is supported by substantial evidence. *See Government of the Virgin Islands v. Lake*, 362 F. 2d 770, 775-76 (3d Cir. 1966).

Bradshaw's principal defense was an alibi, that he was seen at the seaplane terminal at 3:45 p.m., while the shots were heard in the hotel between 4:00 and 4:30 p.m. One witness corroborated the alibi.

The jury, however, may have simply disbelieved the alibi. The supporting testimony came from defendant and from a policeman who was a friend of defendant's brother. The government produced two witnesses who testified that Bradshaw was at the seaplane terminal between 4:30 and 5:00 that afternoon, thus rebutting the evidence of alibi. Further, there was evidence that a clock had been torn from the wall of defendant's hotel room and was found showing a time of 4:40 p.m. This incident could be interpreted as an early step by defendant to contrive an alibi.

In summary, while the case against Bradshaw is not based on direct testimony, there is substantial evidence that the killing of Marilyn Pickering was a willful, deliberate, and premeditated act, that Bradshaw had the

opportunity to commit the crime, that he planned to conceal his presence on St. Croix both before and after the murder, and that Bradshaw hid or destroyed the murder weapon. We hold that the record contains substantial evidence to support the verdict in this case.

III

The second contention defendant raises on appeal is that the judge committed reversible error by granting only five peremptory challenges. The government now concedes that the trial judge made an error in allocating peremptory strikes to the parties. When the judge was asked by defense trial counsel whether he would be inclined to grant more than the usual number of peremptory challenges,² the judge responded

No, I am not, not at all. The normal amount now is five.

The United States attorneys present affirmed that the law permitted five. The judge and the United States attorneys were following the proposed amendment to Federal Rule of Criminal Procedure 24(b) which was transmitted to Congress by the Chief Justice of the United States on April 26, 1976. The amendment would have changed the number of peremptory strikes allowed in single-defendant non-capital cases involving punishment of imprisonment for more than one year from ten to five.³ *See Proposed Amendment to F. R. Crim. P. 24(b), H. R. Doc. No.*

². *But see Blount v. Jugoslavenska Linijska Plovidba*, No. 75-2025 (3d Cir. filed Dec. 8, 1977).

³. The current version of F. R. Crim. P. 24(b) provides in part:

If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges.

94-464, at 1-6 (1976), reprinted in 44 U. S. L. W. 4549 (U. S. April 27, 1976). The amendment was to have taken effect on August 1, 1976.

On July 8, 1976, Congress postponed the effective date of the amendment to Rule 24(b) until August 1, 1977. 90 Stat. 822, see 425 U. S. 1157 (1976). On July 30, 1977, a second bill was signed disapproving the amendment. 91 Stat. 319.

Bradshaw's jury was selected on February 28, 1977. The law effective on that date, as now, entitled him to ten peremptory challenges. Although the trial judge made it clear that he would allow only five strikes, we find that reversal is not appropriate since defendant waived objection to the ruling.

There is no question of the good faith of the trial judge or of the government attorneys in this case. The record reflects that they simply were not aware of the Congressional decision to delay implementation of the amendment to Rule 24(b). Defendant does not contend otherwise.

The record shows that defense counsel not only failed to preserve an objection to the decision of the trial judge, but also that he accepted the ruling. During the discussion over the number of challenges, trial counsel first noted that he thought that he would be entitled to ten peremptory challenges plus one extra for the alternates to be chosen. The judge responded that ten was the number under the "old rules." After some further discussion, defense counsel concluded:

I would like to double check that. You sound like you are not absolutely sure about the rule.

When the jury was finally impaneled after a short-recess, both counsel affirmatively stated that they were satisfied with the composition of the jury. There was never an explicit objection that the amendment had not come into

effect, and at no point during the four-day trial did defendant raise issue again.

Once told by defense counsel that he would "double check" the law on peremptory challenges, the court was justified in assuming that counsel would do so and bring any error of law to the court's attention. Instead, the argument of law on the number of strikes is presented now for the first time on appeal. Under these circumstances, we hold that counsel waived objection to the denial of the five additional peremptory strikes. See generally *Estelle v. Williams*, 425 U. S. 501, 508 (1976); *Government of the Virgin Islands v. Torres*, 476 F. 2d 486, 490 n. 2 (3d Cir. 1973).

Finding no reversible error, we affirm.

APPENDIX B.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 75-2025

CARL BLOUNT,

Appellant,

v.

**JUGOSLAVENSKA LINIJSKA PLOVIDBA
(D. C. Civil No. 74-2147, E. D. of Pa.)**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**Argued October 6, 1977
Before SEITZ, *Chief Judge*, STALEY and HUNTER,
*Circuit Judges.***

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Opinion of the Court.

(Filed December 8, 1977)

SEITZ, Chief Judge.

Plaintiff, longshoreman, appeals from a judgment for defendant, shipowner, on his claim for personal injuries allegedly caused by defendant's negligence while he was discharging cargo from defendant's vessel on December 4, 1972. The judgment was based on the jury's answer to a special interrogatory finding no negligence that was the proximate cause of plaintiff's injuries.

Because of its pervasive importance, we turn immediately to plaintiff's contention that the district court committed reversible error by granting each party a fourth peremptory challenge in lieu of ruling on an objection for cause asserted by each party to a different member of the venire.

Defendant contends that we should not rule on the issue as now posed because plaintiff's counsel did not object on that ground at trial. Defendant says that plaintiff objected solely to the defendant's use of his additional peremptory challenge to strike the last black from the venire.

After each side objected to a different member of the venire for cause the court, instead of ruling on such objections, stated that it would give each side an additional peremptory challenge. Plaintiff's counsel said, "I don't want any additional strikes." The court replied: "I give you four strikes apiece. You can use it or not." We think the record supports plaintiff's objection in its present form, even though it suffers from imprecision. In any event, we conclude that cognizance should be taken of the objection because of the fundamental issue which it raises. *Mazer v. Lipschutz*, 327 F. 2d 42 (3d Cir. 1964); cf. *Smith v. Coy*, 460 F. 2d 1226 (3d Cir. 1972).

Title 28 U. S. C. § 1870 reads:

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. June 25, 1948, c. 646, 62 Stat. 953; Sept. 16, 1959, Pub. L. 86-282, 73 Stat. 565.

The statute, in our view, provides that in single party civil litigation the court is not authorized to allow more than three peremptory challenges per side. In *Detroit, M. & T. S. L. Ry. v. Kimball*, 211 Fed. 633 (6th Cir. 1914), the court held that the word "entitled" in § 1870's predecessor statute was not a word of grant but rather a word of limitation, intended by Congress "not merely to give a minimum or to limit the maximum number of challenges, but finally to fix that number," *id.* at 636. Similarly, the legislative history of a 1959 amendment to § 1870 supports our view. In considering whether to extend to multiple plaintiffs the privilege previously granted multiple defendants to seek additional peremptory challenges, the Senate Judiciary Committee, the Administrative Office of the Courts, and the Attorney General's office all characterized the authorization of extra peremptory strikes in multiple defendant cases as "an exception to this general rule" of the "[e]xisting law [that] now permits three peremptory challenges in civil cases to each party. . . ." S. Rep. No. 848, 86th Congress, 1st Sess., reprinted in [1959] U. S. Code Cong. & Ad. News 2594, 2594-97.

The consequences inherent in a failure to observe the statute's mandate are graphically illustrated by the undis-

puted facts of this case. Defendant does not challenge plaintiff's contention that defendant used its first three peremptories to challenge blacks on the venire. When he was given a fourth peremptory it was used by defendant to strike the last black. This occurred in a case where the plaintiff and his witnesses were black. Passing over any question as to possible legal limitations on the use of peremptory challenges, the reality is that their use can result in what a party legitimately feels is an unfair advantage. Since such challenges are "irrational" there is no reason to deviate from the statute.

Indeed, where a peremptory challenge is added in lieu of ruling on a challenge for cause, it may aggravate the situation. It can result, as here, in a juror serving who was challenged for cause. Thus, the white member of the venire who was challenged for cause by defendant did in fact serve on this jury.¹ We point this out, not to suggest that plaintiff had standing to object to the service by the juror originally challenged by defendant, but to show the potential for prejudice created by a failure to follow the statute. After all, the prospective juror challenged for cause by plaintiff might have ended up on the jury. The court's approach gave defendant an additional peremptory challenge which it clearly was not entitled to regardless of the merits of its challenge for cause. One can only speculate as to what the court would have done had only one side challenged for cause.

We conclude that, in view of the statute, it was reversible error to grant each party an additional peremptory challenge in lieu of ruling on the challenges for cause, at least in a situation where such additional peremptory was exercised by the party who obtained a favorable verdict. Plaintiff is entitled to a new trial.

1. The member challenged for cause by plaintiff did not serve.

Because there will be a new trial, we turn to plaintiff's other claims of error. Plaintiff argues that defendant's requests for charges 24 and 28, given by the court, constitute reversible error. Defendant contends that plaintiff did not object to these instructions and may not be heard to challenge them for the first time in this court. Our examination of the record leaves us in substantial doubt as to whether plaintiff brought his objections to the attention of the district judge. Thus, we do not know whether the trial judge would have given the questioned instructions had he been made aware of the nature of plaintiff's present objections. In these circumstances we think that it would be imprudent to rule on such issues without the benefit of a clear ruling by the trial judge.

Finally, plaintiff argues that the district court committed error in refusing to honor his request to instruct the jury in the language of Section 413 of the Restatement of Torts, Second. It is not clear to us from the record that such an explicit request was made of the district court. Moreover, counsel argue vigorously as to the possible applicability of *Brown v. Rederi*, 545 F. 2d 854 (3d Cir. 1976) and *Hurst v. Triad Shipping Co.*, — F. 2d — (3d Cir. 1977) to this issue. Those cases were decided after the trial in this case and thus the district court did not have an opportunity to determine their relevancy. Given these circumstances and the fact of a new trial, we decline to rule on plaintiff's contention at this time.

The judgment of the district court will be reversed and the case remanded for a new trial.

HUNTER, Circuit Judge, dissenting:

The issue posed in this appeal is the power of the trial judge to grant a litigant in a two-party, civil case more

than three peremptory challenges. As the majority recognizes, this case does not involve an appeal from defense counsel's manner of using peremptory challenges on the basis of race. The use of peremptory challenges is unreviewable. See *Swain v. Alabama*, 380 U. S. 202 (1965); *Sorenson v. Raymond*, 532 F. 2d 496, 500 (5th Cir. 1976).

The majority's interpretation of the governing statute, 28 U. S. C. § 1870, binds the trial judge by allowing only three strikes in all two-party, civil cases. Since I believe that the trial judge is not forbidden by statute from exercising his discretion to grant litigants additional challenges, I respectfully dissent.¹

Until 1948 the number of peremptory challenges in both civil and criminal cases was set forth in the same statute. R. S. § 819; March 3, 1911, Ch. 231, § 287, 36 Stat. 1166. That statute used the same language which now appears in section 1870:

. . . in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges . . .

1. I also disagree with the majority's decision to reach the issue of the number of allocable peremptory challenges. Since plaintiff has shown no prejudice impairing his right to a fair trial, I do not believe that the judge's error, if any, constituted plain or fundamental error. See *United States v. Bamberger*, 456 F. 2d 1119, 1131 (3d Cir. 1972), cert. denied, 413 U. S. 919 (1973); *United States v. Montijo*, 424 F. 2d 207, 208 n. 3 (1st Cir.), cert. denied, 400 U. S. 836 (1970). The only comments relating to this issue made at trial were that the plaintiff did not want any additional strikes and that defendant had improperly used his challenges. Neither remark was an objection to the power of the judge to grant an additional challenge. Since this argument, now raised on appeal, was never directed to the trial judge's attention, he was not afforded an opportunity to correct any possible error before the trial proceeded. See *Faudree v. Iron City Sand & Gravel Co.*, 315 F. 2d 647, 651-52 (3d Cir. 1963). Therefore, we should not consider the argument for the first time on appeal. See *United States v. Partee*, 546 F. 2d 1322 (9th Cir. 1976); *Andrews v Olin Mathieson Chem. Corp.*, 334 F. 2d 422, 429 (8th Cir. 1964).

Multiple defendants or plaintiffs were to be treated as a single party for purposes of the statute.

With the revision of the Judicial Code in 1948, the provisions applicable to criminal trials were consigned solely to the Rules of Criminal Procedure. See F. R. Crim. P. 24(b); Revisor's Note, 28 U. S. C. § 1870. Still, both the criminal rules and section 1870 contain the same terminology of entitlement. By this and subsequent amendments of the statute and criminal rules, multiple parties can, in the discretion of the trial judge, be treated as a single party or could be allowed "additional peremptory challenges." 18 U. S. C. § 1870; F. R. Crim. P. 24(b). As a matter of legislative interpretation, therefore, the reasoning to be applied to strikes in civil cases should apply to criminal cases as well.

The terminology of section 1870 is that a litigant is "entitled" to three strikes. The words "entitled to three peremptory challenges" need not be read as meaning entitled to *only* three. Indeed, a common reading of these words is that the party has a right to *at least* three. No words in the statute explicitly limit the court's discretion to give additional challenges.

The statutory right to peremptory challenges has become an important right of litigants in criminal and civil trials. The use of strikes is intimately bound with the constitutional right to a fair and impartial jury. The peremptory challenge can eliminate a juror when the litigant suspects a bias which cannot be exposed sufficiently to merit a challenge for cause. The strike can be used to minimize the hostility of jurors which might be created by the argument over a challenge for cause. Further, the courts have an interest not only in the jury's impartiality but also in the litigants' perception of impartiality. The peremptory strike preserves both justice and the appear-

ance of justice by allowing the litigant to feel that he is arguing before a fair jury. *Swain v. United States*, 380 U. S. 202, 218-20 (1965); *Photostat Corp. v. Ball*, 338 F. 2d 783, 786 (10th Cir. 1964); 9 Wright & Miller, Federal Practice and Procedure § 2483, at 473 (1971); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan. L. Rev. 1465, 1502 (1975).

I do not believe that these interests are adequately served by an interpretation of section 1870 which limits the number of peremptory challenges to three in all two-party cases. Trials can engender a high degree of emotional response from the community. A murder trial may evoke widespread sensationalism; a civil or criminal trial may become the focus of racial, ethnic, or religious tensions. A trial judge has the primary responsibility even in these tumultuous situations to preserve both the actual impartiality of his tribunal and its appearance of fairness. The peremptory challenge is an important tool for these ends. I cannot agree with an interpretation of the statute which deprives a judge of that tool. The complete responsibility for the conduct of a trial rests on the trial judge, and he should not be constricted unless he exceeds the bounds of his discretion.

The majority points to the only decision discovered interpreting the word "entitled" as used in the statute. *Detroit M. & T. S. L. Railway v. Kimball*, 211 Fed. 633 (6th Cir. 1914). That case held that a party was entitled to only three peremptory challenges.

On the other hand, at least one court, not limiting itself to multi-defendant cases, has stated the general proposition that the trial judge has discretion to grant additional peremptory challenges. *United States v. Caldwell*, 543 F. 2d 1333, 1347 n. 57 (D. C. Cir. 1974). Other courts

have reviewed the failure to grant an additional peremptory challenge in a single defendant criminal case under an abuse of discretion standard. E.g., *United States v. Bentley*, 503 F. 2d 957 (5th Cir. 1974); *United States v. LePera*, 443 F. 2d 810, 812 (9th Cir.), cert. denied, 404 U. S. 958 (1971). These cases were decided under the language of Criminal Rule 24(b), which is identical to section 1870 with respect to the power to grant additional strikes.

Further support for the interpretation of section 1870 which I would follow is found in cases involving several parties. The statute states that several defendants or plaintiffs can be treated either as one party or given additional challenges in the trial judge's discretion. If the language of the statute was meant to limit the number of challenges in a two-party case to three for each side, it should follow that the number in multi-party cases be limited to at most three per party. Case law, however, has not created such a limit. For example, in a case involving one plaintiff and two defendants, one court allowed each side to take ten peremptory challenges. *Carey v. Lykes Brothers Steamship Co.*, 455 F. 2d 1192 (5th Cir. 1972). This holding can be compatible only with the view that the judge has discretion to grant more than the minimum of three peremptory challenges allotted to each party.

To conclude that the judge has discretion to allow additional peremptory challenges in a two-party, civil case is not to say that a party may be granted an unlimited number of strikes. The decision of the trial judge is subject to review under the standard of abuse of discretion. See, e.g., *Globe Indemnity Co. v. Stringer*, 190 F. 2d 1017 (3d Cir. 1951).

Since this case will be remanded on the issue of the selection of the jury, the majority does not reach the other grounds raised on appeal relating to the jury charge. Under these circumstances, it is inappropriate for me to speak

to these other aspects of this appeal. I cannot join, however, in the limitation on the power of a trial judge to permit peremptory challenges in addition to the statutory minimum of three.